IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 241 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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M/S NICOSULF INDUSTRIES & EXPORTS PVT LTD

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 241 of 2001

MR KS NANAVATI AND MR RS SANJANWALA for the Revisionists

MR SS PATEL, PUBLIC PROSECUTOR for Respondent No. 1

MR KH BAXI for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: /08/2001

C.A.V. JUDGEMENT

#. A complaint under secs.24, 25, 43, 44 and 47 of the

Water (Prevention and Control of Pollution) Act, 1974 was filed by the Assistant Environmental Engineer on behalf of the Gujarat Pollution Control Board against a private limited company M/s.Nicosulf Industries & Exports Pvt. Ltd. and its co-directors Kishanbhai M.Narsinh, Mihirbhai G.Virji and Dushyant P.Lejawala, alleging interalia that the accused nos.2,3 and 4 are producing Nicotine Sulphate in their factory and using Tobacco Stuff, Lime, Kerosene and Sulphuric Acid as raw-material, and during the course of process of production they are discharging 10,800 litres of polluted water every day. Under secs.24 and 25 of the Act, every industry is compulsory required to obtain prior permission or approval of the Board for discharging its polluted water used by it either within or outside the industry as per sec.25(1) of the Act. Permission was granted by imposing certain conditions to the accused persons. If, the industry commits breach of conditions, complaint can be filed, which, in the instant case was filed alleging that there was breach of condition no.4, as a result of which, under condition no.7, the consent order automatically lapsed. The accused nos.2,3 and 4 were said to be responsible officers managing day-to-day affairs of the company. On 22-6-1989, a sample of polluted water was collected from the industry. It was analysed by the Laboratory of the Board, which reported that the effluent did not conform to the prescribed standards. The report of the analyst was given on 8-7-1989. Thereafter, show-cause notice was issued to the accused persons. A complaint was accordingly filed.

#. The learned Magistrate convicted all the four accused under secs.24, 25, 43 and 44 of the Act.

#. Feeling aggrieved, the accused preferred an appeal, which was partly allowed on 31-5-2001, whereunder, the accused nos.2 and 4 were acquitted, but the order of conviction and sentence passed against accused nos.1 and 3 was confirmed. It is, therefore, this revision by accused no.1 M/s.Nicosulf Industries and accused no.3 Mihirbhai Virji.

#. Shri KS Nanavati, learned counsel for the revisionists, Shri KH Baxi, learned counsel for the respondent no.2 and Shri SS Patel, learned APP for the respondent no.1 were heard and the material on record, the various enactments and authorities cited by them were considered.

#. Shri Nanavati has assailed the judgment of the lower appellate Court only on four grounds. The first ground

of attack has been that the complainant had no authority to file the complaint, hence, the entire prosecution structure collapsed and order of conviction and sentence against the revisionists can not be maintained. The second ground of attack has been that the offence was alleged to have been committed by the company and the directors of the company can be held liable only when it is established by the prosecution that the directors were managing day-to-day affairs of the company. The third attack has been, that even on merits breach of condition no.4 of the consent or permission is not established. The last attack has been that the sample of alleged polluted water was collected in breach of the provisions of sec.21 of the Act.

#. Shri Nanavati vehemently argued that the complainant had no authority to filed the complaint, and this ground alone is enough for setting aside the order of conviction and sentence maintained by the lower appellate Court against the revisionists. The copy of complaint shows that it was filed by one AA Dolati, Assistant Environmental Engineer on behalf of the Gujarat Pollution Control Board. Shri Nanavati contended that Shri Dolati had no delegated authority as required under sec.49 of the Act, and as such, the complaint was filed by a person having no authority to do so, hence, no prosecution could haveeproceeded on such complaint. For this, he has placed reliance upon sec.49 of the Act, which reads as under :

'(1) No Court shall take cognizance of any offence under this Act except on a complaint made by--

(a) a Board or any officer authorized in this behalf by it; or

(b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint to the Board or officer authorized as aforesaid, an no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of first class shall try any offence punishable under this Act.

(2) Where complaint has been made under Cl.(b) of sub-section (1), the Board shall on demand by such person, make available the relevant reports in its possession to that person: Provided that the Board may refuse to make any such report available to such person if the same is, in its opinion, against the public interest.

(3) Notwithstanding anything contained in Sec.29 of the Code of Criminal Procedure, 1973 (2 of 1974), it shall be lawful for any Judicial Magistrate of the first class or for any Metropolitan Magistrate to pass a sentence of imprisonment for a term exceeding two years, or of fine exceeding two thousand rupees on any person convicted of an offence punishable under this Act.'

#. Relying upon sec.49(1)(a) of the Act, it was urged by Shri Nanavati that no court shall take cognizance of any offence under this Act except on a complaint made by the Board or any officer authorized in this behalf by it. According to him, taking cognizance is barred under sec.49(1) of the Act, unless a complaint is filed either by the Board or by any officer authorized in this behalf by it. It is, therefore, clear from sec.49(1)(a) of the Act that cognizance of complaint can be taken by a Magistrate only when it is filed by the Board or by any officer authorized in this behalf by the Board. So, the first authority to file the complaint is given to the Board and the second competent person who can file the complaint will be a person or officer authorized by the Board for filing a complaint. "Board" has been defined under sec.2(a) of the Act to mean the Central Board or a State Board. "Central Board" has been defined under sec.2(b) of the Act to mean the Central Pollution Control Board constituted under sec.3 of the Act. "State Board" has been defined under sec.2(h) to mean a State Pollution Control Board constituted under sec.4 of the Act.

#. Admittedly, in this case, complaint has not been filed by the Board as defined under the aforesaid section. On the other hand, it has been filed by the Assistant Environmental Engineer on behalf of the Gujarat Pollution Control Board. The cause-title of the complaint shows that Shri AA Dolati had filed the complaint on behalf of the Gujarat Pollution Control Board. Para-3 of the complaint also shows that it was filed by Shri AA Dolati on behalf of the Gujarat Pollution Control Board, as the Board had delegated its powers to file complaint as per resolution passed at the 43rd Meeting of the Water Pollution Board held on 27-3-1984. It is, therefore, to be seen what is the delegation of power under resolution of the Board dated 27-3-1984. Ex.36 is the resolution of the Gujarat Pollution Control Board dated 27-3-1984 which reads as under :

'RESOLVED that the power of sanctioning prosecution in respect of offences committed under the provisions of Water (Prevention and Control of Pollution) Act, 1974 and the rules made thereunder be and is hereby delegated to the Chairman of the Board.'

#. It is, thus, clear that under this resolution only power to sanction prosecution was delegated by the Board to the Chairman of the Board. There is no specific delegation in this resolution that the Chairman is also authorized to file complaint under the Act or to delegate such powers to any officer of the company. Beyond the resolution dated 27-3-1984, no other resolution or delegation of authority to the Chairman of the Board to file complaint or to delegate his powers to file complaint to some other person has been brought on record. Shri KH Baxi, learned counsel for the respondent no.2, however, placed reliance upon order Ex.31 dated 18-8-1989 and urged that, through this order the Chairman has authorized that complaint be filed through the Assistant Environmental Engineer of the Board, who shall take all other necessary and incidental steps for effective progress and conclusion of the proceedings. It is also mentioned in this order that power to sanction instituting a complaint has been delegated to the Chairman by the Board, but there is no mention that power to file complaint by some other person has also been delegated to the Chairman by the Board.

##. Shri Baxi, however, contended that sec.49(1)(a) of the Act has to be read in conjunction with sec.11-A of the Act. Sec.11-A provides that the Chairman of a Board shall exercise such powers and perform such duties as may be prescribed or as may from time to time be delegated to him by the Board. Even if, sec.49(1)(a) and sec.11-A are read together, it can not be said that the legislature intended that the Chairman of a Board can exercise all powers and perform all duties from time to time without specific delegation made to him by the Board. Sec.49(1)(a) is clear enough, from which, it can be said that the complaint can be made firstly by a Board and secondly by any officer authorized in this behalf by the Board. Thus, filing of a complaint under this section can be made by the Board or by any officer authorized by the Board in this behalf. No specific authorization by the Board has been made under resolution dated 27-3-1984 to the Chairman for filing a complaint against any person committing offences under the Act. All that he is authorized under this resolution is power to sanction prosecution by the Chairman of the Board. Power to

sanction prosecution is altogether different from power and authority to file complaint. Under this resolution, it is nowhere mentioned that the Chairman of the Board himself can file a complaint. If, the Chairman himself does not possess power to file complaint under a specific resolution from the Board, it is difficult to understand how he can delegate such power to another officer of the Board. In the absence of specific power delegated by the Board to the Chairman to file complaint or authorizing the Chairman to delegate power to file complaint to some other officer of the Board, no officer can file complaint, and in this view of the matter, the order dated 18-8-1989 Ex.31 can not be said to be valid delegation of power by the Chairman in favour of the Assistant Environmental Engineer of the Board. Even, under sec.11-A of the Act, the Chairman of the Board shall exercise such powers and perform such duties as may be prescribed or as may from time to time be delegated to him by the Board. Thus, without delegation of powers by the Board, the Chairman can not exercise power to delegate the authority to file complaint to some other person. It is not within the general powers of the Chairman of the Board to exercise power of delegation to some other officer of the Board to file complaint.

##. The contention of Shri Baxi on the other hand has been that, power to sanction prosecution and power to institute complaint can not be separated, and these two powers are intermixed, hence, the Chairman of the Board has authority to delegate powers to the complainant to file complaint against the revisionists and other co-directors of the revisionist no.1. He has made reference to the case of GUJARAT POLLUTION CONTROL BOARD, BARODA v. INDIAN CHEMICALS MANUFACTURER & ORS. 1990(2) GLH 572. However, in this case, this aspect was not considered that the power to sanction prosecution and power to file complaint are not separate powers. In this case, considering the provisions of sec.49(1) and sec.11-A read with sec.2(a) and 2(h) of the Act, it was held that the legislature intended to authorize the State Board to delegate its powers and duties, to be performed under the Act, to its Chairman. Therefore, power under sec.49(1) to prosecute or to give previous sanction to prosecute any person for offences under the Act can be delegated by the State Board to the Chairman under sec.11-A of the Act. In this case, order of sanction to prosecute was given by the Chairman, which was held to be legal. It was not held in this case that, power to sanction prosecution and power to file complaint are not separate powers. It is the Board, which, under sec.49(1)(a) of the Act can delegate the power to

institute complaint and this power was never delegated by the Board either in favour of the Chairman of the Board or in favour of any other officer of the Board. Consequently, on the basis of this case, it can hardly be said that the complaint was filed by a person duly authorized or having delegated authority to do so from the Board.

##. The power to institute prosecution and the power to consent to file prosecution are distinct powers as has been held by this Court in ARVINDBHAI MOTIBHAI PATEL v. HARGOVIND PARSHOTTAM PATEL A.I.R. 1971 Guj. 20. Shri Baxi, however, contended that this verdict is not applicable to the facts of the case, inasmuch as, it was given in a case under Prevention of Food Adulteration Act. I am, however, unable to accept this contention. The Division Bench's view of this case is equally applicable to the case under consideration before me. The ratio of this case is, that the power to institute prosecution and the power to consent to filing prosecution are distinct powers. In this case, sec.20(1) of the Prevention of Food Adulteration Act was considered and divided into two different parts. The first part is that, no prosecution for an offence under this Act shall be instituted except by the Central Government or the State Government or the Local Authority or a person authorized in this behalf by general or special order by the Central Government or by the State Government or by the Local Authority. The second part of this section provides that no prosecution for an offence under this Act shall be instituted except with the written consent of Central Government, State Government, Local Authority or a person authorized in this behalf by general or special order by the Central Government or a person similarly authorized by the State Government or a person similarly authorized by the Local Authority. This analysis leads to the conclusion that the power to sanction prosecution and the power to institute prosecution by filing a complaint are distinct powers.

##. In view of the aforesaid discussions, reading sec.49(1)(a) and sec.11-A of the Act, it can be said that cognizance of an offence can be taken by a Court, firstly on a complaint filed by the Board, and secondly by an officer authorized by the Board to file a complaint. Since, there is no authorization by the Board in favour of the complainant to file a complaint, the cognizance taken by the learned Magistrate was illegal, as a consequence of which, the entire trial and exercise in appeal becomes illegal, inasmuch as, the prosecution structure collapsed for want of a complaint filed by a

person duly authorized by the Board.

##. Shri Baxi, however, contended that any person could have filed complaint as provided under sec.49(1)(b) of the Act, and such person does not require any authority or delegation of power from the Board. In my opinion, sec.49(1)(b) of the Act does not apply to a case where complaint is filed by the officer of the Board. On the other hand, it applies to any person who has given notice of not less than sixty days in the prescribed manner of the alleged offence and of his intention to make a complaint to the Board or officer authorized as aforesaid. Thus, if an offence is committed under the Act and the Board does not wish to file a complaint, any person can file a complaint, firstly by giving notice of not less than sixty days in the prescribed manner of his intention to make a complaint, and secondly such notice is to be given to the Board or to the officer authorized by the Board as aforesaid. Consequently, on the strength of sec.49(12)(b) of the Act, the complaint can not be said to have been validly filed by Shri Dolati. As a result thereof, the impugned order of conviction and sentence against the revisionists can not be sustained. The revision, therefore, can succeed only on this ground.

##. However, Shri Nanavati has argued on other points raised by him. His next contention has been that there is no evidence that the revisionist no.2 was responsible to the company for the conduct of the business of the company, and as such, he could not be convicted and sentenced. For this, he has referred to sec.47(1) of the Act, which provides that, where an offence under this Act has been committed by a company, every person, who at the time the offence was committed was incharge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Thus, under this section deemed commission of offence has been introduced by the legislature that, if the offence is committed by a company, every person who was incharge of the company and was responsible to the company for the conduct of the business of the company shall be liable to be proceeded against and punished accordingly alongwith the company. The proviso to this section says that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

##. From sec.47(1) of the Act, it is clear that alongwith the company a person who was incharge of the company and was responsible to the company for the conduct of the business of the company shall be liable for the offence committed by the company. This vicarious criminal liability can be fastened only when it is proved by the prosecution that the revisionist no.2 was incharge of the company and was responsible to the company for the conduct of the business of the company. He was only one director and there were two other directors who were acquitted by the lower appellate Court on the ground that the ingredients of sec.47(1) of the Act could not be established against those two directors. However, the initial burden lay upon the prosecution to prove that the revisionist no.2 was incharge of the company and was responsible to the company for the conduct of the business of the company. Simply because he was present when the sample of water was taken, inference was drawn that he was incharge of the company. But, there is no evidence that he was incharge of the company or that he was responsible to the company for the conduct of the business of the company. Like other two directors who were residing in Bombay, the revisionist no.2 was also residing in Bombay. In the absence of proof beyond doubt that the revisionist no.2 was incharge of the company and was responsible to the company for the conduct of the business of the company, he could not be convicted and sentenced. If, by chance the revisionist no.2 was present when the sample of polluted water was collected, it does not mean that he was incharge of the company. There is no evidence that he was whole-sole incharge of the company. On the other hand, the Manager of the company can be said to be incharge of the company and the revisionist no.2 was never Manager of the company. Likewise, there is no evidence to conclude that the revisionist no.2 was responsible to the company for the conduct of its business. A director can not be said to be responsible to the company for the conduct of the business of the company. Thus, in the absence of such evidence on record, the order of conviction and sentence against the revisionist no.2 can not be sustained. In the absence of such evidence, the revisionist no.2 was not required to prove that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence as contained in proviso to sec.47(1) of the Act. Thus, on this ground the order of conviction and sentence against the revisionist no.2 can not be sustained.

##. The next contention of Shri Nanavati has been, that even on merits breach of condition no.4, for which the

revisionist and two directors were prosecuted has not been established. Condition no.4 in the consent order Ex.32 dated 19-2-1987 provides that the industrial effluent shall be disposed of through solar evaporation pans of impervious construction. Solar evaporation pans shall be operated and maintained in such a way that it shall never overflow. In case of overflow of solar evaporation pans, the overflowed industrial effluent conform to the tolerance limits as given below. Thus, condition no.4 of the consent order provides three things. The first is that the industrial effluent shall be disposed of through solar evaporation pans. The second is that the solar evaporation shall be operated and maintained in such a way that it shall never overflow and the third is that, in case of overflow of solar evaporation pans, the overflowed industrial effluent shall conform to the tolerance limits as given thereunder. It is not the case of the prosecution that the solar evaporation pans were not constructed in accordance with condition no.4. It is also not the case of the prosecution that the solar evaporation pans were not maintained and operated in such a way that it shall never overflow. The case of the prosecution is that the effluent did not conform to the tolerance limits given in condition no.4. Condition no.7 provides that the consent granted by this order shall lapse if the parameters of effluent at any time for disposal are not within the limits prescribed in this order.

##. It is not the case of the prosecution that at the time of inspection by the officers of the Board, the water was overflowing the solar evaporation pans or that sample of polluted water was taken from a place where water was overflowing from the solar evaporation pans. Map Ex.53 clearly shows that the sampling point was neither solar evaporation pan, nor any other place where effluent water was found overflowing from such pans. On the other hand, sampling point is altogether different. It was in pukka drain from centrifuge to evaporation pan. No overflow was noticed in the kachha open lagoon with full of effluent. If, the sampling point was before the effluent reached the solar evaporation pans, it was not collection of polluted water from a place where it overflowed from solar evaporation pans. The same location of collection point is mentioned in the inspection report in column no.10. Consequently, it can not be said that sample was taken from a point which constituted breach of condition no.4. In Ex.54 also sampling point is the same, namely drain leading to solar evaporation pan/lagoon (pukka and kachha) from settling

tank. Under condition no.4, the overflow of industrial effluent not conforming to the tolerance limits given thereunder could have constituted breach of it. It is not collection of effluent from any portion of the factory which could have constituted breach of condition no.4. Unless, the effluent was found overflowing from the solar evaporation pan, neither sample could be collected nor it could be sent for chemical analysis, and if such sample was not conforming to the tolerance limits prescribed in condition no.4, it can hardly be said that the condition no.4 was breached and consequently there could not be automatic lapse of consent as envisaged in condition no.7. Thus, prima facie, it could not be established beyond doubt that either the company, revisionist no.1 or the revisionist no.2 or the other two directors committed an offence punishable under the Act.

##. The last contention of Shri Nanavati has been that there was breach of sec.21(5) of the Act, inasmuch as, the sample of effluent was not sent forthwith by the officers of the Board for analysis to the Laboratory.

'Sec.21(5) of the Act provides that, when a sample of any sewage or trade effluent is taken for analysis under sub-section(1) and the person taking the sample serves on the occupier or his agent a notice under Cl.(a) of sub-section (3) and the occupier or his agent who is present at the time of taking the sample does not make a request for dividing the sample into two parts as provided in Cl.(b) of sub-section (3), then, the sample so taken shall be placed in a container which shall be marked and sealed and shall also be signed by the person taking the sample and the same shall be sent forthwith by such person for analysis to the laboratory referred to in sub-clause (i), or sub-clause (ii), as the case may be, of Cl.(d) of sub-section (3).'

##. Shri Nanavati emphasized the word "forthwith" used in this sub-section and contended that the word "forthwith" means despatch of sample to the laboratory without reasonable delay. He did not contend that the sample should have been sent to the laboratory immediately after collection. On the other hand, he argued that after reasonable time of collection of the sample it should have been sent to the laboratory, which was not done in the instant case. Undisputedly, sample was collected on 22-6-1989 and it was sent for analysis to the laboratory on 28-6-1989. There was thus five to six days' delay in sending this sample to the laboratory.

Ex.54 shows that the date of collection of sample was 22-6-1989. It seems to have been prepared on 23-6-1989, but it was despatched on 28-6-1989. This date is clearly shown on the top of the Ex.54. The sample was received in sealed condition in the laboratory on 28-6-1989. Thus, the sample was received on the date it was despatched alongwith covering letter Ex.54 dated 28-6-1989. Thus, the delay of five to six days has not been explained by the prosecution. Shri Baxi, however, contended that the trial Court has clarified this aspect, but, in my opinion, the trial Court has misread the evidence and has observed that the sample was despatched to the laboratory on 23-6-1989. On the other hand, from Ex.54, it is clear that the letter was despatched on 28-6-1989. It is then immaterial that the letter was allegedly signed by Shri VC Shah on 23-6-1989. In D.K. SOLANKI v. DIVINE INTERMEDIATES & CHEMICALS 1996(1) GLR 729, this Court, in para-9, found that the sample was not sent forthwith to the laboratory for the purpose of analysis. However, the effect of this breach was not considered in this case. To my mind, if the legislature intended to make provision under sec.21(5) of the Act for sending the sample forthwith to the laboratory, it intended that there should not be inordinate and unreasonable delay in sending the sample, and if there is inordinate and unreasonable delay, which remains unexplained from the side of the prosecution, it will certainly vitiate the prosecution. In my opinion, this is the effect of breach of sec.21(5) of the Act for not sending the sample forthwith to the laboratory.

##. The case of AZIM HASHAN PREMJI v. STATE OF GUJARAT 2000(2) GLH 788 cited by Shri Baxi is distinguishable on facts for two reasons. Firstly, it was a case under sec.482 of the Code of Criminal Procedure for quashing of complaint. This Court found that the complaint can not be quashed, because there was clear averment in the complaint that the accused, including the petitioners were incharge of and responsible for the conduct of the business of the company. On this averment, it was not thought proper to quash the complaint. In the case before me, there is averment in para-4 of the complaint that the accused no.1 is an industry and the remaining accused are its partners and they are responsible managers of this industry. This alone is not sufficient for making revisionist no.2 liable for the alleged offence. As indicated above, there is no evidence against the revisionist no.2, that as provided under sec.47 of the Act he was incharge of the company and was responsible to the company for the conduct of the business of the company. He was not partner but Director

of the company. Consequently, when there is no evidence to this effect, the view of this Court in Azim Hashan's case (supra) can not be applied to the facts of the case before me.

##. For the reasons stated above and in view of the discussions made above, I find that the order of conviction and sentence modified and recorded by the lower appellate Court can not be sustained. The revision, therefore, succeeds and is hereby allowed. The order of conviction and sentence against the revisionist nos.1 and 3 recorded by the lower appellate Court is hereby set aside. The revisionists are acquitted of the charges for which they were tried. They are on bail in this revision. Their bail bonds are cancelled and sureties discharged. The fine, if paid by them shall be refunded to them. The order of acquittal recorded by the lower appellate Court against the accused nos.2 and 4 is, however, maintained.

Dated : __/08/2001. (D.C. Srivastava, J.)

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